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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHARLES E. MITCHELL

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 79–107) is reported in 32 B. T. A. 1093. The opinion of the Circuit Court of Appeals (R. 442–449) is reported in 89 F. (2d) 873.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 17, 1937 (R. 449). The petition for a writ of certiorari was filed August 17, 1937 (R. 450), and granted October 11, 1937 (R. 449). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer was indicted under Section 146 (b) of the Revenue Act of 1928 for a willful attempt to evade and defeat taxation. Does his acquittal bar the Commissioner from asserting, under Section 293 (b) of the Revenue Act of 1928, a 50% addition to the tax deficiency by reason of "fraud with intent to evade tax"?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 65–69.

STATEMENT

In his income tax return for the year 1929 the respondent claimed, and deducted from gross income, an alleged loss of $2,872,305.50 from a purported sale of 18,300 shares of National City Bank stock to his wife (R. 48). The respondent also failed to return as income an item of $666,666.67, received by him on July 1, 1929, as a distribution from the management fund of the National City Company, of which he was chairman (R. 48).

On April 25, 1933, an indictment was returned against the respondent by a grand jury of the District Court of the United States for the Southern District of New York. The indictment contained two counts. Only the first count is here material. That count charged that the respondent "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income

tax of, to-wit, $728,709.84, upon his net income for 1929'' (R. 78–79). Thereafter the respondent was tried upon the charges contained in the indictment before the court and a jury. The trial commenced on May 11, 1933, and terminated on June 22, 1933, when the jury returned a verdict of not guilty on all counts (R. 79).

On December 8, 1933, the Commissioner asserted a deficiency against the respondent for the year 1929 in the amount of $728,709.84, together with a 50% addition thereto by reason of fraud in the amount of $364,354.92 (R. 15). This deficiency was arrived at by disallowing the deduction of the claimed loss on the purported sale of the 18,300 shares of National City Bank stock and by including in gross income the $666,666.67 distribution from the management fund received by the respondent on July 1, 1929 (R. 16). The item of $728,709.84, set out in the first count of the indictment, is the same item as that involved in the deficiency, but the 50% addition to the deficiency by reason of fraud was not involved in the indictment (R. 79). The item of the indictment and the deficiency arose from the same transactions of the respondent (R. 79).

From the determination of this deficiency the respondent appealed to the Board (R. 3–14). The Board held that the deficiency was due, either in whole or in part, to fraud with intent to evade tax; and that the prior acquittal in the criminal proceed-

ing did not afford a basis for either the defense of *res judicata* or double jeopardy (R. 79–88). The result was that the whole deficiency for the year 1929 including the 50% addition was sustained (R. 107–108). The respondent petitioned for review (R. 108). The Circuit Court of Appeals for the Second Circuit upheld the deficiency for the ordinary tax but held that the 50% addition thereto was barred by reason of the prior acquittal in the criminal proceeding (R. 448–449). The Commissioner's petition for a writ of certiorari, filed on August 17, 1937, was granted (R. 449). The respondent herein filed a petition for certiorari on August 12, 1937, from so much of the judgment below as upheld the claim of the Commissioner for the ordinary tax. That petition was based mainly upon the fact that the deficiency, in the absence of a finding of fraud, would be barred by the two-year statute of limitations; and upon the argument that the absence of fraud in this case was *res judicata* under the decision in *Coffey* v. *United States,* 116 U. S. 436. Respondent's petition was denied by this Court on October 11, 1937, No. 307, October Term, 1937.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the respondent's acquittal in the prior criminal proceeding under Section 146 (b) of the Revenue Act of 1928 constituted a bar to

the fifty per centum addition to the deficiency by reason of fraud under Section 293 (b) of the Revenue Act of 1928.

2. In holding and treating Section 293 (b) of the Revenue Act of 1928 as criminal in nature.

3. In not affirming the decision of the Board of Tax Appeals *in toto*.

SUMMARY OF ARGUMENT

1

The fifty per centum addition to the deficiency does not constitute additional punishment for the crime of which respondent was acquitted, and therefore is not barred on the ground of double jeopardy. The addition is imposed under Section 293 (b) of the Revenue Act of 1928 as an addition to, and a part of, a deficiency determined to be due to fraud with intent to evade tax. Provisions of similar import have existed in both the internal revenue and the customs laws for more than a century. The addition is clearly civil in nature and effect, imposed under and as an exercise of the taxing power; it is compensatory in nature; and it constitutes a valid incidental safeguard for the protection of the revenue by discouraging fraud. It has been so considered and treated by the Congress, and by the administrative officers of the Government. Like additions have been so considered and treated by the courts in a long line of decisions. The decision below by treating Section 293 (b) as

punitive in nature and effect is in direct conflict with this historic position, and, if sustained, would seriously impair and probably destroy the effectiveness of such provisions in our internal revenue and customs laws. The court below erroneously applied the decision of this Court in *Coffey* v. *United States,* 116 U. S. 436, as necessitating this result. If we are wrong in this view, then we respectfully submit that the *Coffey* case should be reexamined and either modified or overruled.

II

The issue of fraud involved under Section 293 (b) is not *res judicata* by reason of the prior acquittal in the criminal case. The doctrine of *res judicata* is essentially one against re-litigation. Where a claim or demand has proceeded to judgment, it may not again be litigated. However, where a second proceeding is upon a different claim or demand from that litigated in a prior proceeding, as is the case here, the rule applies only to issues common to both and actually adjudicated in the first. The doctrine does not apply to the instant case, because: (1) it is inapplicable to a civil proceeding following an acquittal in a prior criminal prosecution since the requisite quantum of proof is different in the two cases; (2) the two proceedings are different in nature and consequences; (3) the issue in the present proceeding is different from that litigated in the criminal case;

and, (4) the application of the doctrine in the instant case would remove an important civil safeguard provided by Congress for the protection of the revenue.

ARGUMENT

The court upheld the item of the deficiency relating to the normal tax but modified the order of the Board by ordering expunged that part of the deficiency represented by the fifty per centum addition thereto (R. 442–449). The court held that the addition to the deficiency was barred by reason of the acquittal in the prior criminal proceeding. This holding was said by the court below (R. 448) to be compelled by the decisions of this Court in *Coffey* v. *United States,* 116 U. S. 436; and *United States* v. *La Franca,* 282 U. S. 568. However, in both of those cases the second proceeding was essentially criminal in nature and punitive in purpose, whereas the additional tax in the present case is purely civil in nature, operation, and purpose. The court below stated that "Though this rule [of the *Coffey* case] seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility, it is implicit in the decision of *Coffey* v. *United States* which is binding on us in the absence of a modification by the Supreme Court" (R. 448). This language justifies the inference, we believe, that the court below doubted the soundness of its decision herein and felt that the decision in the *Coffey* case should be modified or overruled.

The opinion below is not clear as to whether the decision is based upon double jeopardy or upon *res judicata.* (1) If based upon double jeopardy, the court has either misapplied the *Coffey* case, or, if that case was correctly applied, then, we submit, it should be modified or overruled. Moreover, the decision below misapplied the *La Franca* case, and is in conflict with *McDowell* v. *Heiner,* 15 F. (2d) 1015 (C. C. A. 3d) [adopting the opinion of the District Court, 9 F. (2d) 120 (W. D. Pa.)], certiorari denied, 273 U. S. 759, and other decisions. The holding below is contrary to the Congressional intent and the administrative practice of many years standing. (2) If the decision below was based upon the doctrine of *res judicata,* it is contrary to the decisions of this Court in *Lewis* v. *Frick,* 233 U. S. 291, and *Murphy* v. *United States,* 272 U. S. 630.

I

THE FIFTY PER CENTUM ADDITION TO THE DEFICIENCY DOES NOT CONSTITUTE ADDITIONAL PUNISHMENT FOR THE CRIME OF WHICH THE RESPONDENT WAS ACQUITTED AND THEREFORE IS NOT BARRED ON THE GROUND OF DOUBLE JEOPARDY

The court below stated that the question was whether the fifty per centum additional tax was designed to punish fraudulent tax dodgers or was a mere preventive measure (R. 448), and concluded that it was required to treat the imposition of the penalty of fifty per centum as barred by the prior acquittal of the respondent in the criminal action

(R. 448). The court felt that this holding was required by the *Coffey* and *La Franca* cases.

The respondent's defense to the fifty per centum addition to the deficiency is in substance a plea of *autrefois acquit*. His position is that he has been tried and acquitted under Section 146 (b) of the Revenue Act of 1928; and that the assertion of the additional tax under Section 293 (b) constitutes an attempt to punish him for the crime of which he has been acquitted and again places him in jeopardy for the same offense. In speaking of a plea of *autrefois acquit* this Court said in *Burton* v. *United States*, 202 U. S. 344, 380:

> A plea of *autrefois acquit* must be upon a prosecution for the same identical offense. 4 Bl. 336. It must appear that the offense charged, using the words of Chief Justice Shaw, "was the same *in law* and *in fact*. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact.*" *Commonwealth* v. *Roby*, 12 Pick. 496, 504. * * *

It is clear that the criminal prosecution and the present case are not the same in point of law.

Section 146 (b) of the Revenue Act of 1928, the statute under which the respondent was indicted and tried, provides in part that "* * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof," shall be guilty of a felony and upon con-

viction thereof shall be subject to fine or imprisonment, or both. But the fifty per centum addition to the tax is imposed by Section 293 (b) of the Revenue Act of 1928, which provides in part that "If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency)" shall be assessed, collected, and paid in lieu of the addition to the tax imposed by Section 3176 of the Revised Statutes, as amended.

The court below treated the provisions of Section 293 (b) as adding punishment for the offense defined in Section 146 (b). But this, we submit, was clearly erroneous. The court's holding (1) ignores the legislative history of these sections; (2) conflicts with a long line of judicial decisions which construe predecessors of these sections and similar provisions in the internal revenue and customs laws; (3) refuses to recognize the civil, compensatory nature of the 50% addition; (4) fails to consider the nature of Section 293 (b) as imposing a special surtax based upon the classification of fraud; (5) unnecessarily casts serious constitutional doubt upon the administrative application of Section 293 (b) as a civil safeguard for the protection of the revenue; and (6) misconstrues and misapplies the decisions relied upon.

(1) *The legislative history shows that Congress intended the 50% addition under Section 293 (b)*

to be a civil safeguard for revenue assessment and collection entirely apart, and distinct, from the criminal punishments provided in Section 146 (b). Section 293 (b) of the Revenue Act of 1928 had its inception in Section 14 of the Revenue Act of 1864 (c. 173, 13 Stat. 223, 226–227). With slight changes Section 14 of the Act of 1864 is now embodied in Section 3176 of the Revised Statutes. Section 3176 was made expressly applicable to the income tax by Section II I of the Revenue Act of 1913 (c. 16, 38 Stat. 114, 179), and was so continued by Section 16 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 775). In the Revenue Act of 1918 (c. 18, 40 Stat. 1057, 1083), Section 250 (b) inserted a separate provision for the income tax in lieu of, but similar to, Section 3176 of the Revised Statutes. With minor changes this part of Section 250 (b) has been continued in Section 250 (b) of the Revenue Act of 1921 (c. 136, 42 Stat. 227, 264); Section 275 (b) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253, 298) and 1926 (c. 27, 44 Stat. 9, 57), and as Section 293 (b) of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 858), and subsequent Revenue Acts.

The criminal provisions stem from Section 15 of the Revenue Act of 1864 (c. 173, 13 Stat. 223, 227). Section 15 of the Revenue Act of 1864 appears as Section 3179 of the Revised Statutes. The criminal provisions under the income-tax law are to be found in Section II F and G (d) of the Reve-

nue Act of 1913 (c. 16, 38 Stat. 114, 171, 177); Section 18 of the Revenue Act of 1916 (c. 463, 39 Stat. 756, 775); Sections 1004 and 1209 of the Revenue Act of 1917 (c. 63, 40 Stat. 300, 325, 336); Section 253 of the Revenue Acts of 1918 (c. 18, 40 Stat. 1057, 1085) and 1921 (c. 136, 42 Stat. 227, 268); Section 1017 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 343); Section 1114 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 116); Section 146 of the Revenue Act of 1928 (c. 852, 45 Stat. 791, 835); and, Section 145 of the Revenue Acts of 1932 (c. 209, 47 Stat. 169, 217), 1934 (c. 277, 48 Stat. 680, 724), and 1936 (c. 690, 49 Stat. 1648, 1703).

It is clear that the Congress has treated the provision for the fifty per centum addition to the tax contained in Section 293 (b) of the Revenue Act of 1928 as providing an addition to the tax and as being entirely separate, distinct, and apart from the criminal penalties imposed by the revenue laws. For example, in the Revenue Act of 1928, Section 146, dealing with felonies and misdemeanors, is entitled "Penalties," while Section 293 is entitled "Additions to the Tax in Case of Deficiency" and is contained in Supplement M entitled "Interest and Additions to the Tax." Section 291, being the first section under Supplement M, imposes an addition to the tax in case of failure to file a return. Section 292 fixes the rate of interest to be paid on deficiencies. Section 293 (a) imposes an addition to the deficiency where it is due to negligence or

intentional disregard of rules and regulations but without intent to defraud. Section 293 (b), the provision herein involved, imposes an addition to the deficiency where it is due to fraud with intent to evade tax and Section 294 imposes an addition to the tax in case of nonpayment. Each of these provisions is clearly a part of the same statutory pattern. They constitute civil incidents and safeguards to the proper assessment and collection of the income tax, which, it must be remembered, is in the first instance computed and assessed by the individual taxpayer in the return prepared and filed by him.

Thus Section 293 (b) does not purport to create a distinct criminal offense. Nor does it constitute an additional punishment for a criminal offense under Section 146 (b), since the fifty per cent addition may be imposed without a showing of the elements requisite to a criminal charge under Section 146 (b). See pp. 45, 60, *infra*.

(2) *The courts have uniformly treated Section 293 (b), its statutory predecessors and similar provisions in the internal revenue and customs laws as entirely civil in effect.* It is a matter of small consequence whether the additional tax be called a "penalty" or an "addition." It may be conceded that the addition to the tax imposed by Section 3176 of the Revised Statutes, as amended, was referred to as a penalty in 17 Op. A. G. 433 (1882), and has been so denominated in decisions of the courts. That does not, however,

render the imposition punitive in nature or penal in effect. See *Tayloe* v. *Sandiford,* 7 Wheat. 13, 17; *Stearns* v. *United States,* 22 Fed. Cas. 1188, 1192 (C. C. Vt.).[1] The decisions of this Court recognize two classes of penalties: (1) those imposed as punishment for crime, such as were involved in *United States* v. *La Franca,* 282 U. S. 568; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386; *Lipke* v. *Lederer,* 259 U. S. 557; and *Wong Wing* v. *United States,* 163 U. S. 228; and (2) those which do not follow as a result of the

[1] Nor does the mere fact that the addition to tax imposes a pecuniary detriment indicate that Section 293 (b) is punitive in nature. As long ago as *Taylor* v. *United States,* 3 How. 197, 210, Mr. Justice Story pointed out that a tax proceeding does not have punishment as its objective because pecuniary detriment is inflicted. The argument that because a detriment results the objective is punishment was rejected in *Murphy* v. *United States,* 272 U. S. 630. This Court there pointed out through Mr. Justice Holmes (p. 632) that the fact that the subsequent civil proceeding imposes "a punishment is the only ground upon which the former [criminal] judgment would be a bar."

It has even been held that disbarment, although it undeniably results in detriment, is not punishment, because the primary objective of the proceeding is not punishment. *Ex parte Wall,* 107 U. S. 265; *Matter of Rouss,* 221 N. Y. 81. Accordingly, "An acquittal of alleged crime is not a bar to a proceeding by the state to revoke the accused's license to practice medicine or law for the same act." 2 Freeman on Judgments, 5th Ed., p. 1386. See also *Shea* v. *Evenson,* 159 Wis. 623; *State* v. *Corron,* 73 N. H. 434; *In re Registration of Campbell,* 197 Pa. 581; *In re Newell Smith,* 10 Wend. (N. Y.) 449; *In re Thresher,* 33 Mont. 441; *In the Matter of* ———————, *an attorney,* 86 N. Y. 563; *People* v. *Weeber,* 26 Colo. 229; *People* v. *Thomas,* 36 Colo. 126; *State* v. *Cary,* 135 La. 579.

commission of crime, but are mere sanctions to enforce obligations validly imposed by the Congress. See *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 329. The penalties of the first class may not be collected by distraint or by administrative action and would be barred by an acquittal in a prior criminal prosecution for the crime for which such penalties are a part of the punishment. See *Lipke* v. *Lederer*, and other cases, *supra*. But that is not true of penalties of the second class. Such penalties may be enforced by administrative action as well as by actions at law. As stated by this Court in *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339:

> In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

In support of this holding the Court cited *Bartlett* v. *Kane*, 16 How. 263 (penalty for undervaluation of imports); *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272 (recovery

of amount of defalcation by distraint); and *Passavant* v. *United States,* 148 U. S. 214 (penalty for undervaluation of imports). The distinction was stated as follows in *United States* v. *Nash,* 111 Fed. 525, 528 (W. D. Ky.):

> The court, however, is of opinion that, while the word "penalty" has a broader meaning than the word "fine," still that a fine, in the judicial sense, is always a penalty, although a penalty may sometimes not be a fine, or even a criminal punishment. For example, penalties are often inserted in bonds, official or otherwise, as a measure of damages, and the enforcement of them in no way invokes the criminal processes of the courts. Sometimes, when taxes are not paid when due, a penalty is added; but in such instances no crime has been committed, and the word "penalty" is used in a restricted sense, and does not include any idea of criminal punishment. It is rarely, if ever, made a criminal offense, by express provisions of the statutes, to omit to pay taxes at the exact time when they become due, and the enlargement of the amount of taxation which results from such failure is measured by way of interest or otherwise. * * *

That the addition to the tax prescribed by Section 293 (b) is one of the second class referred to above and falls within the rule of the *Oceanic Navigation Co.* case, *supra,* there can be no doubt. As early as 1868, this Court, in *Dorsheimer* v. *United States,* 7 Wall. 166, said (at p. 173):

> The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit. * * *

In the year 1872, *Doll* v. *Evans,* 7 Fed. Cas. 855 (C. C. E. D. Pa.), upheld the determination by the internal revenue officials of a penalty of 100 per centum prescribed by Section 14 of the Revenue Act of 1864, *supra,* for a false statement of income. The penalty had been collected along with additional taxes by distraint. The court said (at p. 857):

> The remaining cause of demurrer is, that the act of congress, in so far as it imposes a penalty for a false or fraudulent return, is unconstitutional. The act does not invest the assessor with power to "sentence" anybody; it does not even allow him any discretion as to the penal increase of the tax. It authorizes him to inquire whether the return is false or fraudulent, and if he so finds, requires him to add one hundred per centum to the tax. This is not conferring judicial power upon him, within the meaning of the constitution. It is simply empowering him to ascertain a fact, according to which he is to adjust the amount of the tax imposed by law. That this function is judicial in its nature there is no doubt, but so are many like functions committed to public officers, as essential to the performance of their official

> duties. They are within the competency of congress to confer, as necessarily incident to the execution of its expressly granted powers.
>
> The acts of congress furnish many examples of this. They are to be found especially in the laws relating to the collection of customs; and the validity of such legislation has never been denied. * * *

Again in *Clay* v. *Swope,* 38 Fed. 396 (C. C. Ky.), decided in 1889, an administrative determination of five per centum additional tax under Section 3184 of the Revised Statutes for failure to pay an internal revenue tax was sustained. The Collector, after imposing the additional tax, compelled its payment by a threat of distraint upon the property. The additional tax was held to be a civil penalty and the court pointed out (at p. 399) that "undoubtedly congress has the constitutional right and authority to enact laws which it may deem necessary and proper to secure the collection of the internal taxes which it may constitutionally impose."

Other statutes empowering officials to add penalties for noncompliance with statutory requirements are the Act of August 30, 1842 (c. 270, 5 Stat. 548, 564), Section 17; the Act of July 30, 1846 (c. 74, 9 Stat. 42, 43), Section 8; the Act of June 10, 1890 (c. 407, 26 Stat. 131, 134), Section 7; the Act of July 24, 1897 (c. 11, 30 Stat. 151, 212), Section 32. Each of these Acts imposes an additional duty for the undervaluation of imported goods.

Section 8 of the Tariff Act of July 30, 1846, was involved in *Bartlett* v. *Kane, supra.* That statute imposed an additional duty of twenty per centum for undervaluation of imported goods. In speaking of additional duties, the Court said (at p. 273):

> An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an under-valuation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. * * *

In the same case the Court was careful to point out (at p. 274): "A construction, which would give to the fraudulent importer all the chances of gain from success, and exonerate him from the contingencies of loss, would be a great discouragement to rectitude and fair dealing." In *Passavant* v. *United States, supra,* the Court was considering additional customs duties imposed by Section 7 of the Act of June 10, 1890 (c. 407, 26 Stat. 131). In speaking of such additional duties the Court said (at p. 221):

> They are designed to discourage undervaluation upon imported merchandise and to prevent efforts to escape the legal rates of duty. It is wholly immaterial whether they are called additional duties or penalties. Congress had the power to impose them under either designation or character. * * *

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In *Helwig* v. *United States,* 188 U. S. 605, it was decided that additional duties imposed by Section 7 of the Act of June 10, 1890, *supra,* were "penal" for the purposes of a statute which excepted "penalties" from the jurisdiction conferred upon the circuit courts. In the opinion, the Court speaks of the imposition of the additional sums, which were over five times more than the normal duties, as punitive. But the transactions involved in the *Helwig* case arose before the passage of Section 32 of the Act of July 29, 1897, *supra;* and the Court recognized (p. 616) that in this later Act, which cut the rate of additional duties in half, Congress had removed any doubt of its intention by specifically providing that the additional duties should not be construed to be penal.

Statutes providing for additions to taxes or duties for failure to make returns, or for making incomplete or false returns, and for their imposition and collection by administrative action as a part of such taxes or duties, and as civil incidents and safeguards to the collection of such taxes and duties, have been in force during the greater part of the period of the existence of this Government. During all this time it is clear that the Congress, the administrative officers of the Government, and the courts have considered such additions or penalties as necessary and proper civil safeguards for the protection of the revenue. This long established and uniform history and course of conduct

constitutes an impelling construction of statutes imposing additions to tax as being strictly civil in effect.[2]

That the addition to the tax imposed by Section 3176 of the Revised Statutes, and similar provisions, is civil in nature and effect is also shown by cases dealing with the method of collection of additional taxes and penalties. In *Thome* v. *Lynch,* 269 Fed. 995 (Minn.), a case which preceded *Lipke* v. *Lederer, supra,* in holding that the so-called taxes imposed by Section 35 of the National Prohibition Act were not taxes and could not be collected by distraint, it was said (at p. 1002):

> * * * under section 3187, R. S. (Comp. St. § 5909), the collector of internal rev-

[2] It has been recognized since *Stuart* v. *Laird,* 1 Cranch 299, 309, decided in 1803, that a long continued practice with respect to the construction of a provision is of the greatest significance. It was there said: "To this objection, which is of recent date, it is sufficient to observe, that practice, and acquiescence under it, for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed." This rule has been recognized both with respect to Congressional construction [*Cincinnati Soap Co.* v. *United States,* 301 U. S. 308; *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 328–329, and cases there cited] and administrative treatment [*Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378]. See also, *Ozawa* v. *United States,* 260 U. S. 178, 194; *Brown* v. *Duchesne,* 19 How. 183, 194.

> enue, though authorized to collect taxes by distraint, was not authorized to collect penalties in general by that method, but only certain specified penalties, viz., the 5 per cent. penalty added under section 3184 (Comp. St. § 5906) *and by express provision in section 3176 the penalty therein provided; both of these penalties being added to taxes, properly so called—that is, exactions for revenue for government use.* [Italics ours.]

In *Kausch* v. *Moore,* 268 Fed. 668 (E. D. Mo., 1920), where a holding similar to that in the *Thome* case was made, it was also said (at pp. 672–673):

> If the penalty here in question could be viewed merely as an integral part of the taxes charged, or as in the nature of a surtax thereon, and not as merely punitory, some authority to uphold distraint for its summary collection might be found in the cases. * * *

In *Middleton* v. *Mee,* 277 Fed. 492 (S. Dak.), it was said (at p. 498) that Section 3187 of the Revised Statutes:

> * * * while authorizing the collector of internal revenue to collect taxes by distraint, does not pretend to authorize the collection of penalties by that method, but only certain specified penalties that attach to the taxes, legally levied, for nonpayment on demand, etc. In this statute these penalties are clearly additions provided by the statute for purposes of revenue.

Again, as showing that the addition to the tax imposed is truly a tax and not punishment for crime, a taxpayer cannot invoke the aid of equity to enjoin the collection thereof under Section 3224 of the Revised Statutes. This is clearly shown by the opinion of the court in *Kohlhamer* v. *Smietanka,* 239 Fed. 408 (N. D. Ill.), where it was said (at p. 412):

> While it is true that section 3224 does not specifically include "penalties" as such, those here sought to be collected are such an integral part of the tax and so interwoven into the tax as to be a part of it. Section 3176, R. S. (Comp. St. 1913, § 5899), being one of the administrative sections referred to in section 23 of the act under consideration, provides that the amount fixed as a penalty shall be "added to the tax," and "collected at the same time and in the same manner," *and as a part of the tax,* etc.

This application of Section 3224 appears to be recognized in *Thome* v. *Lynch, supra; Kausch* v. *Moore, supra;* and *Middleton* v. *Mee, supra.* See also, *Czieslik* v. *Burnet,* 57 F. (2d) 715, 717 (E. D. N. Y.). Under these decisions it is clear that the addition to the deficiency imposed by Section 293 (b) is a part of the tax, and as such is intended purely for revenue purposes and not as punishment for crime.

This was the clear import of *McDowell* v. *Heiner,* 15 F. (2d) 1015 (C. C. A. 3d) [adopting the opinion

of the District Court, 9 F. (2d) 120 (W. D. Pa.)], certiorari denied, 273 U. S. 759. The taxpayer there sought to enjoin the assessment and collection of additions to his taxes imposed by the Commissioner under Section 3176 of the Revised Statutes. The case was heard on bill and answer and the bill was dismissed. The District Court there pointed out and emphasized the distinction between civil penalties and criminal punishment as follows (pp. 122–123):

> The results which follow in the two cases are wholly distinct and different in their purpose; the one is a criminal action instituted by the sovereign power for the punishment of crime, after indictment, trial, and conviction. The other is to enforce the collection of the taxes imposed. * * *
>
> * * * * *
>
> It is one thing to charge a party with a crime. It is a wholly different thing to charge the existence of facts as the basis for the enforcement of a penalty by civil suit, or by the action of administrative officers, although such facts may constitute a crime.
>
> * * * * *
>
> The Constitution does not guarantee trial by jury for the imposition of penalties for the nonpayment of taxes. None of the constitutional provisions relative to the right of trial by jury have any application here, as the plaintiff is not being tried for a crime. * * *

See also, *Hepner* v. *United States,* 213 U. S. 103, 106–108; *Stockwell* v. *United States,* 13 Wall. 531.

Since the addition to the tax imposed by Section 293 (b) is not punishment for crime but a mere sanction to enforce obligations validly imposed by the Congress, it follows that safeguards against double jeopardy have no application to the instant case. See *Castle* v. *United States,* 17 F. Supp. 515 (C. Cls.) [citing with approval the Board decision in this case]. In *Slick* v. *United States,* 1 F. (2d) 897 (C. C. A. 7th, 1924), the Commissioner had asserted and collected an addition to the tax by reason of fraud. Thereafter, the taxpayer was indicted. To the indictment he pleaded double jeopardy by reason of the collection of the additional tax. The Circuit Court of Appeals, citing *Kepner* v. *United States,* 195 U. S. 100, dismissed this contention as being without merit.

Thus, there is a long line of judicial decisions treating Section 293 (b) and its statutory antecedents, as well as similar provisions in the customs laws, as entirely civil in nature. The reasoning of the court in *Hanby* v. *Commissioner,* 67 F. (2d) 125 (C. C. A. 4th), presents an erroneous deflection from this otherwise unbroken line of decisions, and that reasoning should be repudiated by the Court so that the law on this subject may remain clear. In the *Hanby* case, the Commissioner asserted a deficiency, including a 50% addition under Section 250 (b) of the Revenue

Act of 1921. The taxpayer, who had been indicted and convicted under Section 253 (b) of the 1921 Act, pleaded double jeopardy. The court sustained the Commissioner's determination, and that result we believe was clearly correct. However, the court gratuitously assumed that the Congress had intended to punish fraudulent conduct not only by fine and imprisonment under Section 253 (b), but also by the added penalty under Section 250 (b). The court then reasoned that double jeopardy did not apply since the 50% addition under Section 250 (b) was not a *second* punishment for the crime for which the taxpayer was convicted under Section 253 (b) but constituted together with fine and imprisonment under Section 253 (b) the *whole* punishment for unlawful and fraudulent conduct. When this reasoning in the *Hanby* case is considered together with the holding of the court below in the instant case, it might be contended that the fifty per centum addition to the tax here could only be imposed in the event of a conviction under Section 146 (b) on the ground that punishment for crime may only be imposed after proper trial and conviction. But such a result is clearly contrary to the intent of Congress and conflicts with the continuous judicial construction of this and like statutes.

(3) *The fifty per centum addition under Section 293 (b) compensates the Government for the added expense of collection of taxes occasioned by*

fraudulent concealment.—Section 293 (b) operates, not as a punitive, but as a compensatory measure. The elements of civil fraud were pointed out in *Southern Development Co.* v. *Silva,* 125 U. S. 247, 250. Of these elements, secrecy and concealment predominate in an income tax fraud. To establish fraud in such a case, it is generally necessary for experienced revenue agents patiently to uncover the obscured facts underlying a fabricated picture. Many times the Government is impeded in this difficult task by deliberate attempts at further concealment of facts. Frequently a fraud case requires months and sometimes years of effort. Such work is essential in determining the true concealed tax liability. The additional expense occasioned by the fraud is necessarily great. In the absence of a provision such as Section 293 (b), the costs and expenses of investigation caused by the dishonest taxpayer would fall upon the honest taxpayer. Section 293 (b) puts the burden of such expense upon him who should properly bear it—the particular dishonest taxpayer. The section represents a remedial effort by Congress to fix the damages resulting to the Government in fraud cases and to impose those damages on the particular persons responsible.

As long ago as 1871 this Court, in *Stockwell* v. *United States,* 13 Wall. 531, expressed the view that a provision contained in Section 2 of the Act of March 3, 1823 (c. 58, 3 Stat. 781), was com-

pensatory in nature. That statute provided that any person who received, concealed, or bought goods with the knowledge that they had been illegally imported should pay a sum double the amount or value of such goods. In holding this provision to be compensatory in nature, the Court said (at pp. 546–547):

> It was to secure indemnity for a wrong to rights of property. * * * If any person receives them, knowing them to have been illegally imported, or conceals them, or buys them, his act necessarily embarrasses, if it does not defeat altogether the possibility of the government's availing itself of its right and securing the property. It is therefore manifest that the act of 1823 was fully as remedial in its character, designed as plainly to secure civil rights, as are the statutes rendering importers liable to duties. Its plain purpose was to protect the government in the unembarrassed enjoyment of its rights to all goods and merchandise illegally imported, and it proportioned indemnity for infringement upon such rights to the loss which such infringement might cause. The amount recoverable is in proportion to the value of the goods abstracted or concealed, or bought, not at all in proportion to the degree of criminality of the act of receipt or concealment. Obviously there may be more guilt in concealing goods illegally imported, worth only one hundred dollars, than in receiving or concealing imported property

> worth ten times as much, but the statute measures the liability not by the guilt but by the value of the goods. It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of their single value. The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. There are many cases in which a party injured is allowed to recover in a civil action double or treble damages. Suits for infringement of patents are instances, and in some States a plaintiff recovers double damages for cutting timber upon his land. It will hardly be claimed that these are penal actions requiring the application of different rules of evidence from those that prevail in other actions for indemnity. * * *

The distinction between a criminal and a civil penalty was further clearly drawn in the *Stockwell* case in disposition of the contention that Section 2

of the Act of 1823 had been repealed by necessary implication by the Act of 1866, imposing criminal punishments. The Court said (p. 551):

> It is now insisted that the act of 1823 was in conflict with this act, or, if not, that it was supplied by it. Very clearly, however, this is not maintainable. The act of 1823 was, as we have seen, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States. The act of 1866 is strictly penal, not at all remedial. * * *

The *Stockwell* case seems to be directly applicable here and conclusive on the Government's contention: Section 146 (b) of the Revenue Act of 1928 and Section 4 of the Act of 1866 are both purely criminal; Section 293 (b) of the Revenue Act of 1928 and Section 2 of the Act of 1823 are both compensatory in nature and purely civil.

(4) *The fifty percent addition is in the nature of a special surtax imposed on the basis of fraud.* Fraud has constituted a basis of classification for separate treatment in Anglo-American civil law at least since the statute of 13 Eliz., c. 5 (1570), and the opinion of Lord Coke in *Twyne's Case,* 3 Co. Rep. 80b (1601), on fraudulent conveyances. See *Coder* v. *Arts,* 213 U. S. 223. It would seem too clear for dispute that fraud, which has thus served as a basis for separate classification in our law for so many centuries, may be used as a basis for a special surtax under the Sixteenth Amendment.

And here in substance Congress has imposed in Section 293 (b) a fifty percent surtax where the element of fraud is present. Special surtaxes are not novel in the income tax law. Many special provisions of a similar nature appear in the revenue laws for the purpose of preventing evasion and avoidance and for the protection of the revenue. For example, a special provision with respect to the use of corporations to prevent the imposition of surtaxes on stockholders has existed in the income tax since the Act of October 3, 1913 (c. 16, 38 Stat. 114, 166), Section II, A, 2.[a] This particular provision, in the statutory form in which it appears subsequent to the Revenue Act of 1918, imposes a special surtax and has been upheld by the courts. See, e. g., *United Business Corporation* v. *Commissioner*, 62 F. (2d) 754 (C. C. A. 2d), certiorari denied, 290 U. S. 635; *Williams Investment Co.* v. *United States*, 3 F. Supp. 225 (C. Cls.); *United States* v. *R. C. Tway Sales Co.*, 75 F. (2d) 336 (C. C. A. 6th). To deny to the Congress the power to impose a higher rate of tax here where fraud appears might cast doubt on the hitherto undoubted power of Congress to deal in an appropriate civil manner with other specific instances and types of tax evasion. In such situations it is certainly within the legitimate province of the Congress to

[a] The provision appears as Section 3 of the Revenue Act of 1916; Section 220 of the Revenue Acts of 1918, 1921, 1924, and 1926; Section 104 of the Revenue Acts of 1928 and 1932; Section 102 of the Revenue Acts of 1934 and 1936.

determine when a civil provision affords the requisite safeguard and when a criminal provision is necessary. See *Goldsmith-Grant Co.* v. *United States*, 254 U. S. 505, 510.

(5) *To hold Section 293 (b) punitive in nature would cast serious constitutional doubt upon the administrative application of that section as a civil safeguard for the protection of the revenue.* We respectfully submit that a holding to the effect that Section 293 (b) is punitive would not only overturn the legislative history and judicial and administrative construction of such legislation, but would create a grave constitutional uncertainty and embarrassment to the Government in the collection of the national revenue. If, as was held in the court below and assumed in the *Hanby* case, *supra*, the 50% addition is punitive, then both the power of the Commissioner to take action under Section 293 (b) and the jurisdiction of the Board of Tax Appeals to consider an addition to a deficiency under that section, may be seriously questioned on constitutional grounds.

In *Lipke* v. *Lederer*, 259 U. S. 557, it was held that the so-called taxes, retained in force and reimposed by Section 35 of the National Prohibition Act which prohibited, and made criminal, dealing in liquor, were in reality punitive penalties. Mr. Justice McReynolds, speaking for the Court, noted that (p. 562): "The guarantees of due process of law and trial by jury are not to be forgotten or

disregarded." The doubt as to the power of administrative officers to assess and collect a penalty truly punitive in nature is fortified by the observation in the dissenting opinion of Mr. Justice Brandeis (p. 564). The view that administrative officers may not have power to assess and collect truly punitive penalties is reiterated in *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, 391–392.

The court below treated Section 293 (b) as punitive and refused to permit recovery of the fifty percent addition in this civil suit after *acquittal* in a prior criminal suit. In *United States* v. *La Franca*, 282 U. S. 568, 574, it is stated that a statute authorizing the collection of a punitive penalty by a suit civil in form following a criminal *conviction* would raise grave constitutional doubts. Thus it is doubtful whether the decision below leaves any field for the valid operation of Section 293 (b)*, apart from the possible suggestion that sections 146 (b) and 293 (b) must be regarded as alternative and mutually exclusive procedures. But even this suggestion is unavailing to save Section 293 (b) from the constitutional doubts just discussed, engendered by the decision below, whether the sec-

*As a practical matter if Section 293 (b) is held to be punitive in nature, it will be difficult, if not impossible, in many cases to collect the 50% addition even though there is no criminal proceeding under Section 146 (b) since the Government will be unable to call the taxpayer as a witness (*Lees* v. *United States*, 150 U. S. 476, 480), or compel him to produce his records and papers (*Boyd* v. *United States*, 116 U. S. 616; *United States* v. *Zucker*, 161 U. S. 475, 479–480).

tion be regarded as affording an alternative or a wholly independent remedy.

There is, and can be, no question upon the clear language of Section 293 (see p. 67 *infra*), that subsection (b) thereof is intended to be administratively applied. The question of construction here is whether Congress, nevertheless, intended the 50% addition under Section 293 (b) to be purely civil or punitive. To construe the section as punitive raises grave constitutional doubts under the *Lipke, Regal Drug Corp.,* and *La Franca* cases, as to the validity of legislation which has been enforced by administrative action and civil suit for almost three-quarters of a century. Decisions of this Court uniformly hold that "a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401;[5] *United States* v. *Standard Brewery,* 251 U. S. 210, 220; *Baender* v. *Barnett,* 255 U. S. 224, 226. Here it is not only possible to

[5] *United States* v. *Jin Fuey Moy,* cited in the text, is similar to the present case on the question of avoiding constitutional doubt by proper construction. There this Court construed the Harrison Drug Act as a revenue measure so as to avoid constitutional objection that Congress was exercising a police power within the respective States. Mr. Justice Holmes, who delivered the opinion of the Court, in affirming the same construction by the District Court, said (p. 402):

"It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the Dis-

avoid constitutional doubt by construing Section 293 (b) as a civil safeguard for the protection of the revenue, but indeed such construction is in accord with the administrative practice and compelled by judicial construction during the entire period.

The value of Section 293 (b) as a civil safeguard for the revenue cannot be overestimated. It compensates the Government for the added effort and expense of investigating and discovering fraud. It relieves honest taxpayers of an unjust burden. And the extent to which ordinary revenues are protected by this additional liability for fraud, while

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trict Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

The *Jin Fuey Moy* case presented a much more difficult situation for the application of the principle of avoiding constitutional doubt than does the present proceeding. There a certain proviso exempted the possession of drugs prescribed in good faith by a physician from the operation of a section making unlawful the possession of drugs by "any person not registered" with the collector of internal revenue. The Court recognized (p. 402) that the proviso was "a powerful argument taken by itself for a broader meaning" than raising and collection of revenue. But so important did the Court consider the avoidance of constitutional doubt, that it nevertheless concluded (p. 402):

"Even if for a moment the scope and intent of the act were lost sight of the proviso is not enough to overcome the dominant considerations that prevail in our mind."

Clearly the difficulties in the way of a construction avoiding constitutional doubts which were present in the *Jin Fuey Moy* case are not present here, and the holding of Section 293 (b) as a civil protection for the revenue should follow *a fortiori* from the *Jin Fuey Moy* decision.

immeasurable, must be great indeed. To hold that Section 293 (b) imposes added punishment for the crime defined by Section 146 (b) might well result in nullifying this essential civil safeguard. The Government would then be forced, as its sole protection for its revenue, to proceed by criminal indictment and trial in all fraud cases. It is apparent on the face of Section 293 that Congress did not intend that result.

(6) *The Coffey and La Franca decisions are not controlling here.*—The decision below that the additional tax here is barred by the prior acquittal resulted from the opinion of the court that such a holding was required by the decisions of this Court in the *Coffey* and *La Franca* cases, *supra*. We respectfully submit that neither of those cases requires such holding but that, on the contrary, both are consistent with the Government's position. In the *Coffey* and *La Franca* cases, criminal statutes were the basis of the proceeding and punishment was the objective.

The *Coffey* case was a proceeding *in rem* for the forfeiture of certain distilled spirits and other property of Coffey which were incident to the fraud practiced by Coffey in failing to pay a liquor tax on those spirits. Coffey filed a claim for the property and pleaded that he had been acquitted in a prior criminal proceeding for the same offenses, and under the same sections of the Revised Statutes, as were the basis for the *in rem* proceeding. To this plea the Government de-

murred. This Court in holding Coffey's plea good pointed out that, (a) both proceedings were criminal in nature, (b) both proceedings had the same objective, that is, punishment of Coffey; and (c) both proceedings were based in the main upon the same statutory sections.

The meaning of the *Coffey* case was clarified in *Stone* v. *United States*, 167 U. S. 178. There the defendant's prior acquittal on a criminal charge was held not to be a bar to a subsequent civil action by the United States. This Court said (at pp. 186–187):

> We are of opinion that the present case is not covered by the decision in *Coffey* v. *United States*. The judgment in that case was placed distinctly upon the ground that the facts ascertained in the criminal case, as between the United States and the claimant, could not be "again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts." In the *Coffey case* there was no claim of the United States to property, except as the result of forfeiture. In support of its conclusion, the court referred to *United States* v. *McKee*, 4 Dill. 128, observing that the decision in that case was put on the ground "that the defendant could not be twice *punished* for the same crime, and that the former conviction and judgment was a bar to the suit *for the penalty*." [Italics as in original.]

The same distinction was again drawn in the *La Franca* case.

In *Boyd* v. *United States*, 116 U. S. 616, decided after the *Coffey* case and at the same term of Court, it was pointed out with regard to a forfeiture substantially the same as that involved in the *Coffey* case, that "If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment," (p. 634). The Government in the *Coffey* case, having failed to avail itself of a remedy which it might have had in its first proceeding against the defendant, was denied leave to seek that remedy in a second proceeding. Here, however, the addition to tax under Section 293 (b) could not have been imposed as a part of the punishment by the District Court upon a conviction under Section 146 (b).

The Court considered the forfeiture involved in the *Coffey* case as additional punishment for the crime. See *Boyd* v. *United States, supra*, at p. 634. Historically there is a clear and well defined distinction between forfeitures and additions to taxes. We have already set forth the origin and development of Section 293 (b) of the Revenue Act of 1928. We have seen that that provision had its origin in Section 14 of the Revenue Act of 1864. We have noticed similar provisions in the revenue laws of this country from an early date. These additions to tax are of American origin and have long been

deemed necessary and essential civil safeguards in our revenue structure. On the other hand, forfeitures have their origin in remote antiquity. The deodand is one type of forfeiture. 1 Tucker's Blackstone 301. A forfeiture such as was involved in the *Coffey* case bears some analogy to the law of deodand. See *Goldsmith-Grant Co.* v. *United States,* 254 U. S. 505, 510–511. It has from ancient times been considered a punishment for crime. 2 Blackstone, Commentaries (Christian, Chitty, etc., Ed., 1866) 308; 2 Tucker's Blackstone 267; see also *Various Items* v. *United States,* 282 U. S. 577, 580. Manifestly, there is no relation between forfeitures and additions to taxes. It is submitted that there is an obvious confusion in attempting to apply the principles governing forfeitures to civil safeguards such as additions to tax under Section 293 (b). It seems clear that this Court never intended the *Coffey* case to be so applied. See *Murphy* v. *United States,* 272 U. S. 630; *Lewis* v. *Frick,* 233 U. S. 291; *Stone* v. *United States,* 167 U. S. 178.

If, however, there does exist any doubt as to the meaning of the *Coffey* case, then, we submit, in view of the considerations herein set forth, that the doctrine of that case should be restricted to situations such as that there presented. That has been the apparent trend of decisions of this Court since the *Coffey* case. See *Murphy* v. *United States; Lewis* v. *Frick; Stone* v. *United States,* all *supra.* Indeed, it is doubtful under

the decision in *Various Items* v. *United States*, 282 U. S. 577, whether the *Coffey* case is still the law even in the general field of forfeitures.[6] In the *Various Items* case, a forfeiture was upheld even though there had been a prior conviction of the owners of the property for conspiracy based upon the same transactions as the forfeiture.[7] This Court ruled that the constitutional prohibition

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[6] The doubt of the court below as to the soundness of the *Coffey* case is indicated by the following language in its opinion (R. 448): "Though this rule seems hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility, it is implicit in the decision of *Coffey* v. *United States* which is binding on us in the absence of a modification by the Supreme Court". This doubt has been shared by other courts. Thus in *United States* v. *Gully*, 9 F. (2d) 959 (S. D. N. Y.), after an acquittal, Judge Learned Hand dismissed a libel for the forfeiture of a vessel upon the authority of the *Coffey* case, pointing out that it was not his place to decide whether that case was rightly decided; "That, of course, is a question which only the Supreme Court can reconsider" (p. 960). See also *People* v. *Rohrs*, 49 Hun. 150 [N. Y.]; *People* v. *Snyder*, 90 App. Div. 422 [N. Y.]; *People ex rel. Haffen B. Co.* v. *Clement*, 67 Misc. 527 [N. Y.], and *Micks* v. *Mason*, 145 Mich. 212. The doctrine of the *Coffey* case has been criticised and disapproved by text writers. Van Fleet on Former Adjudication, § 388; 1 Freeman on Judgments (5th ed.), § 319; see also 36 Col. L. Rev. 1007.

[7] The *Various Items* case differs in fact from the *Coffey* case in that the criminal prosecution involved in the *Coffey* case was for substantive offenses, whereas the criminal prosecution involved in the *Various Items* case was for conspiracy. However the *ratio decidendi* of the *Various Items* case does not permit of a distinction between the two cases based upon this difference. See *Various Items* v. *United States*, *supra*, at pp. 580–581. The basis of decision in the

against double jeopardy did not apply. The *Coffey* case was not cited. Despite the unmistakable trend of decisions of this Court to narrow the application of the *Coffey* case to the field of forfeitures, and indeed to confine it to the very situation there presented, the court below extended the application of that case to an entirely new and unrelated field.

In the *La Franca* case, this Court held that exactions there sought to be collected were not true taxes but penalties intended as punishment for infraction of law. The defendant having previously been convicted upon an information charging him with an offense under the same facts as were involved in the subsequent proceeding, the Court held that the second suit could not be maintained. It quoted from *United States* v. *Chouteau*, 102 U. S. 603, 611, where it was expressly stated that the penalty there involved, although recovered in a civil action "is still as a *punishment* for the

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Various Items case is summarized by the following paragraph from the opinion (p. 581):

"A forfeiture proceeding under R. S. 3257 or 3281 is *in rem*. It is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient. In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished. The forfeiture is no part of the punishment for the criminal offense. *Origet* v. *United States*, 125 U. S. 240, 245–247. The provision of the Fifth Amendment to the Constitution in respect of double jeopardy does not apply. *United States* v. *Three Copper Stills*, 47 Fed. 495, 499; *United States* v. *Olsen*, 57 Fed. 579, 582 *et seq.*; *Sanders* v. *Iowa*, 2 Iowa (Clarke ed.), 230, 278."

infraction of the law" and therefore "a former acquittal or conviction may be invoked to protect against a *second punishment* for the same offence." [Italics supplied.]

The suit held to be barred in the *La Franca* case was one by the Government to recover "taxes" and penalties alleged to be due under the National Prohibition Act from the defendant as a retail liquor dealer. Section 35 of that Act provided that *upon evidence of an illegal sale of liquor,* a tax should be assessed and collected "in double the amount now provided by law, with an additional penalty of $500 on retail dealers." This Court pointed out that in reality this was but to say that a person who made an illegal sale was liable for a "tax" in double the amount of the tax "imposed by pre-existing law for making a legal sale, which existing law renders it impossible to make"; and that a "penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act"; and that such an exaction was a penalty "involving the idea of punishment for infraction of the law" (p. 572).

That the decision in the *La Franca* case was based squarely upon the ground that punishment was the purpose of the second proceeding is clear from the statement of this Court in *Various Items* v. *United States,*[*] *supra,* at p. 580:

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[*] The *Various Items* case was argued on the same day as the *La Franca* case, and the decisions in both cases were handed down on the same day by Mr. Justice Sutherland.

> In *United States* v. *La Franca, ante,* p. 568, we hold that, under Sec. 5 of the Willis-Campbell Act, a civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding *in rem* to forfeit property used in committing an offense.

This Court in the *La Franca* case (pp. 572–573) drew the distinction which is applicable here between this case and the *La Franca* and *Coffey* cases. It was pointed out that *Lipke* v. *Lederer,* and *Regal Drug Co.* v. *Wardell, supra,* settled the proposition that the exaction in the *La Franca* case was punishment for crime and hence barred by previous acquittal, whereas *United States* v. *One Ford Coupe,* 272 U. S. 321, and *Murphy* v. *United States, supra,* were inapplicable to the situation presented by the *La Franca* case since in those cases the object was not punishment. Here the 50 per cent addition is not punishment for crime as in the *La Franca, Lipke,* and *Regal Drug* cases, and hence is not barred by the previous acquittal.

There is nothing in either the *Coffey* or the *La Franca* case which indicates that the 50 per cent addition here involved is punitive. The court below stated (R. 448):

> The only rule necessarily derivable from *Coffey* v. *United States* would seem to be

> that an acquittal in a criminal prosecution is a bar to a civil action to enforce fines or forfeitures of property *which are in their nature criminal penalties.* [Italics supplied.]

It then considered the question whether the 50 per cent additional tax in the present case is punitive. The conclusion that the 50 per cent addition is punitive was based upon the language of this Court in the *La Franca* case, that the imposition of a tax "'in double the amount' provided by law 'upon evidence of an illegal sale'" of liquor, under the Act there considered, was a punitive penalty and would not be "'converted into a tax by the simple expedient of calling it such'" (R. 448). But the court's interpretation of the *La Franca* case completely overlooks the fundamental difference between the nature of the so-called tax in the *La Franca* case, which had no relation to the ordinary support of the Government, but was solely "imposed by statute as *punishment* for an unlawful act" (p. 572), and the additional tax in the present case. Here the 50 per cent addition is a part of the deficiency and part of the tax. It is levied by Congress under its power to levy and collect taxes. The statute under which the addition is asserted is strictly a taxing statute executed solely to provide revenue and not to punish for criminal violations of a regulatory statute. The exactions in the *La Franca* case were

criminal penalties since they could be enforced only if a crime had been committed in violation of the regulatory National Prohibition Act. In the *La Franca* case the penalty and criminal provisions were closely interwoven. But the two provisions here involved appear in separate and independent sections. And the addition to the deficiency may be incurred without the criminal offense being committed and *vice versa*. For it is settled that the issue of fraud under Section 293 (b) is not an issue under Section 146 (b). *United States* v. *Scharton*, 285 U. S. 518, discussed in detail, *infra*, p. 60; see *United States* v. *Clayton-Kennedy*, 2 F. Supp. 233, 239 (Md.).

In conclusion, we submit that the addition to the tax imposed by Section 293 (b) is not imposed as punishment for crime; that the rules relating to double jeopardy have no application; and that consequently the respondent's acquittal in the criminal case does not constitute a bar here. The decision of the court below on the point here involved was not required by prior decisions of this Court, but on the contrary conflicts with the long line of judicial decisions to which we have referred; is contrary to the congressional intent and the administrative practice which has existed for many years; and endangers a necessary and essential civil safeguard for the protection of the Government's revenues.

II

THE ISSUE OF FRAUD INVOLVED UNDER SECTION 293 (B) IS NOT RES JUDICATA BY REASON OF THE PRIOR INDICTMENT, TRIAL, AND ACQUITTAL OF THE RESPONDENT IN A CRIMINAL PROCEEDING

Whether a second proceeding even though civil in form involves double jeopardy depends upon whether its objective is punishment. (See Point I, *supra.*) As stated by this Court in *Murphy* v. *United States, supra,* that it imposed "punishment is the only ground on which the former judgment would be a bar" (p. 632). That is the determining factor, no matter whether the first proceeding resulted in acquittal or conviction. Whether a second proceeding on an issue therein is *res judicata,* however, depends upon wholly different considerations, including the outcome of the first proceeding. It is clear, for example, that if the criminal proceeding had resulted in a conviction of respondent, no defense of *res judicata* could have been raised herein on his behalf. Moreover, differences in degrees of proof required in the two proceedings are immaterial to the application of *double jeopardy.* But, as we will show, it is well settled that an acquittal in a criminal proceeding can not be *res judicata* in a subsequent civil proceeding, because of the difference between the two proceedings in the degree of proof required.

However, the court below failed in its opinion to distinguish between the two doctrines, and it is not clear whether the holding that the 50% addition

was barred was based on *res judicata* or double jeopardy. The court's statement that the rule in the *Coffey* case was "hard to justify in view of the different degrees of proof required in order to establish criminal guilt and civil responsibility" (R. 448), would indicate that the decision below was based on *res judicata*. Yet, so far as the application of the doctrine of *res judicata* is concerned, the decision of the court below that the 50% addition was barred is inconsistent with its holding allowing the ordinary deficiency. The court held that a determination of fraud under Section 276 (a) of the Revenue Act of 1928 was not precluded by the prior acquittal.[9] That holding was clearly correct, and it may be noted that respondent's petition for certiorari from that holding, in which respondent relied on the *Coffey* case as requiring a contrary result, was denied (No. 307, October Term, 1937). But the doctrine of *res judicata* appears equally inoperative to preclude the determination of fraud under Section 293 (b).

Res judicata is essentially a doctrine of repose aimed against relitigation of a matter which has passed into judgment. See *United States* v. *Leffler*, 11 Pet. 86, 100. There are two branches of the doctrine. First, a subsequent proceeding upon the same claim or demand which has passed into judg-

[9] In the absence of such a determination, the deficiency here would have been barred by the general two-year statute of limitations. Section 275 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 858.

ment in a prior proceeding is not maintainable. Second, a proceeding between the same parties on a claim or demand different from that involved in a prior proceeding is precluded only as to the precise issue or issues adjudicated in the prior proceeding. See *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623; *Packet Co.* v. *Sickles*, 24 How. 333, 341–342; *Duchess of Kingston's* Case, 20 How. St. Trials 537 (1776). The two branches of the doctrine are concisely stated in the *Tait* case (p. 623):

> The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action. *Cromwell* v. *County of Sac*, 94 U. S. 351, 352, 353; *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48; *United States* v. *Moser*, 266 U. S. 236, 241.

Thus the application of the doctrine of *res judicata* to a given case depends upon the existence of a plurality of matters in combination, and the burden is upon the person relying on the prior judgment to establish the existence of the necessary elements. Bower, *The Doctrine of Res Adjudicata*, 9.

The present proceeding is clearly not for the same claim or demand as that adjudicated in the criminal suit against respondent, and the first branch of the doctrine is inapplicable here. Cf. *Tait* v. *Western Md. Ry. Co., supra.*

We submit that neither the application of the second branch of the doctrine, which requires an identical issue in the two proceedings, nor any other application of the doctrine of *res judicata,* is warranted here because (1) *res judicata* is inapplicable to a civil proceeding following an acquittal in a prior criminal prosecution since there is a vital difference in the quantum of proof required; (2) the nature and consequences of the two proceedings are entirely dissimilar; (3) the issue in the present proceeding is different from that litigated in the criminal prosecution; and (4) the doctrine of *res judicata* should not be applied to deprive the Government of an important civil safeguard provided by Congress for the protection of the revenue.

(1) *The doctrine of res judicata is inapplicable to a civil proceeding following an acquital in a prior criminal prosecution.* All that was adjudicated by the acquital in the criminal case was that the respondent had not been proved guilty beyond a reasonable doubt of doing the criminal acts there charged against him. *Murphy* v. *United States,* 272 U. S. 630, 633; *Lewis* v. *Frick,* 233 U. S. 291, 302; *Stone* v. *United States,* 167 U. S. 178, 196;

Chantangco v. *Abaroa,* 218 U. S. 476, 483; *United States* v. *Warner Bros. Pictures,* 13 F. Supp. 614 (E. D. Mo.); *United States* v. *Donaldson-Shultz Co.,* 148 Fed. 581 (C. C. A. 4th). The Government is, of course, precluded from thereafter disputing the correctness of the result in the criminal case. But it does not follow that petitioner is precluded from asserting a claim for the additional tax against the respondent. The acquittal in the criminal case is no bar to the assertion of this civil claim. See 2 Black, Judgments, Section 529; 1 Greenleaf on Evidence (16th Ed.), Section 537; Taylor on Evidence, Section 1693; Everest & Strode, Law of Estoppel (2d Ed.) 140; and 11 L. R. A. (N. S.) 653, 655.

This is so because the quantum of proof required in a criminal prosecution is different from that required here. In the criminal prosecution the Government failed to prove the charge beyond a reasonable doubt. But here, while the evidence of fraud was required to be clear and convincing, proof of fraud beyond a reasonable doubt was not necessary. See *Oriel* v. *Russell,* 278 U. S. 358, 364–365; *United States* v. *Regan,* 232 U. S. 37, 46–48.

In *Lewis* v. *Frick, supra,* an alien was ordered deported for bringing a woman into this country for immoral purposes. He filed a petition for a writ of *habeas corpus* on the ground that the issue in the deportation proceeding was *res judicata* by

reason of his acquittal of the same charge in a prior criminal proceeding. The writ was denied. This Court, in affirming the denial of the writ, held that the acquittal did not render the subsequent proceeding *res judicata*. After stating that the issues were not identical, the Court went on to say (p. 302):

> And, besides, the acquittal under the indictment was not equivalent to an affirmative finding of innocence, but merely to an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused. * * *

In *Stone* v. *United States, supra,* this Court, after distinguishing the *Coffey* case, said (at p. 188):

> In the criminal case his acquittal may have been due to the fact that the Government failed to show, beyond a reasonable doubt, the existence of some fact essential to establish the offence charged, while the same evidence in a civil action brought to recover the value of the property illegally converted might have been sufficient to entitle the Government to a verdict. * * *

In *Murphy* v. *United States, supra,* the defendants were acquitted of the criminal charge of maintaining a nuisance in violation of the National Prohibition law. Subsequently, an action was brought in equity under the provisions of another section of the same law to abate the same nuisance.

The defendants pleaded their former acquittal and relied on the *Coffey* case. Mr. Justice Holmes, speaking for the Court, referred to the contention as being "plausible but unsound," and said (at pp. 632–633):

> That it did impose a punishment is the only ground on which the former judgment would be a bar. For although the parties to the two cases are the same, the judgment in the criminal case does not make the issues in the present one *res judicata,* as is sufficiently explained in *Stone* v. *United States,* 167 U. S. 178, and *Chantangco* v. *Abaroa,* 218 U. S. 476. The Government may have failed to prove the appellants guilty and yet may have been and may be able to prove that a nuisance exists in the place. * * *

This Court then referred with approval to the "carefully considered" case of *State* v. *Roach,* 83 Kans. 606. In that case the Supreme Court of Kansas said (at pp. 611–612):

> What a verdict of not guilty really decides is that the evidence does not exclude every reasonable doubt of the defendant's guilt. If in the present case the injunction action had been tried first it would hardly be seriously contended that a judgment for the plaintiff would bar a defense in the criminal action. A sufficient reason why the defendant would not be concluded by the result in the civil case is that his guilt would not have been established beyond a reasonable doubt. * * *

In *United States* v. *Warner Bros. Pictures, supra,* the defendants were acquitted in a criminal case of the charge of violating the Sherman Act. Thereafter, the United States began a suit in equity against them for an injunction alleging the same conspiracy charged in the previous criminal proceeding but covering an additional period of about seven months. In denying the defendants' motion to dismiss upon the ground that the issue presented was *res judicata,* the court said (at p. 616):

> The cases of *Stone* v. *United States,* 167 U. S. 178, 17 S. Ct. 778, 42 L. Ed. 127; *Lewis* v. *Frick,* 233 U. S. 291, 34 S. Ct. 488, 58 L. Ed. 967; and *Chantangco* v. *Abaroa,* 218 U. S. 476, 31 S. Ct. 34, 54 L. Ed. 1116, clearly establish the doctrine that an acquittal on a criminal charge is not a bar to a civil action instituted by the government and arising out of the same facts on which the criminal action was based.

To the same effect is *United States* v. *Schneider,* 35 Fed. 107 (C. C. Ore.).[10] That was a civil action

[10] This rule, that an acquittal in a criminal proceeding is not *res judicata* in a civil proceeding because of the difference in quantum of proof, is followed by state courts [*Cowdery* v. *State,* 71 Kans. 450; *Myers* v. *Maryland Casualty Co.,* 123 Mo. App. 682; *Riker* v. *Hooper,* 35 Vt. 457; *State* v. *Sargood,* 80 Vt. 415; *State* v. *Weil,* 83 S. C. 478; *Busby* v. *State,* 51 Tex. Crim. Rep. 289; *Schindler* v. *Royal Ins. Co.,* 258 N. Y. 310; *People ex rel. Haffen B. Co.* v. *Clement,* 67 Misc. 527 (N. Y.)]; and by text writers [2 Freeman on Judgments (5th Ed.) 1384].

to recover taxes alleged to be due from the defendant as a wholesale dealer in malt liquor. The defendant entered a plea of *res judicata* claiming that he had been acquitted in a criminal action to recover a penalty for the non-payment of the same taxes. The Government's demurrer to the plea was sustained. After referring to 1 Wharton on Evidence, Section 776, and 1 Greenleaf on Evidence (16th Ed.), Section 537, the court said (at p. 109):

> * * * it may be that the same jury, on the same evidence, acting on this rule, would find the defendant was a dealer in malt liquors, as alleged in this civil action, and refuse to do so in a criminal one. Therefore the United States is not estopped, by the verdict in the criminal action, to allege and prove in this one that the defendant was a wholesale dealer in malt liquors.

The *Coffey* case is not an authority to the contrary. That decision was based upon the constitutional safeguard against double jeopardy rather than *res judicata*. It was urged in argument in that case that because of the difference in the required quantum of proof between the criminal prosecution and the subsequent civil proceeding to forfeit the property of Coffey, the latter proceeding was not barred. This contention was dismissed by the Court upon the ground that the object of the second proceeding was to inflict punishment on Coffey for the criminal acts of which he had

been acquitted. Difference in degree of proof is immaterial on a question of double jeopardy. The fact that the second proceeding is punitive is immaterial on a question of *res judicata.* Thus the decision in the *Coffey* case appears to relate only to the field of double jeopardy. If broad language in the opinion in the *Coffey* case was once susceptible of the interpretation that the decision was one on *res judicata,* that possible ambiguity has since been entirely removed. The *Coffey* case has been discussed by this Court and its doctrine has been carefully delimited as meaning that facts ascertained in a criminal case, as between the United States and the defendant, may not be "again litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts." (Italics as in original.) *Stone* v. *United States, supra,* at p. 186; *Chantangco* v. *Abaroa,* 218 U. S. 476, 481–2; *Murphy* v. *United States, supra,* at pp. 632–3; see also the *Coffey* case at pp. 444–5, and *Boyd* v. *United States,* 116 U. S. 616, 634. The contention that the *Coffey* case is applicable in the field of *res judicata* was definitely rejected by this Court in the subsequent case of *Murphy* v. *United States, supra,* at pp. 632–633; see also *Lewis* v. *Frick, supra.*

(2) *The difference in the nature and consequences of the two proceedings further emphasizes the inapplicability of the doctrine of res judicata to this proceeding.* No part of the deficiency,

whether ordinary tax or the fifty per centum addition thereto, could have been collected or imposed in the criminal proceeding. In this respect the instant case differs materially from the *Coffey* case, which was an action *in rem* to enforce a forfeiture provided for in the criminal statute and which could have been imposed as a part of a judgment of conviction in the criminal case. As has been pointed out above (p. 38), this fact was indicated in *Boyd* v. *United States*, 116 U. S. 616, 634. Since the addition to the deficiency (and, for that matter, the ordinary item of the deficiency) could not have been asserted or imposed in the criminal case, the verdict of acquittal cannot operate to bar the addition. The case of *Ash Sheep Co.* v. *United States*, 252 U. S. 159, makes this conclusion abundantly clear. There the Government had sought an injunction and statutory penalties in a suit in equity. The Court gave nominal damages but refused to award the statutory penalty on the ground that equity would not aid in the enforcement of a penalty of the nature there involved. Subsequently this action at law was brought to collect the penalty. The defendant asserted that the matter was *res judicata*. On this point the Court said (at p. 170):

> Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the Court of

> Appeals that "a judgment is not conclusive on any question which, from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered."

Without mutuality of estoppel there can be no application of the doctrine of *res judicata*. In *Chantangco* v. *Abaroa*, 218 U. S. 476, the Court said (at p. 481):

> The requisite of mutual estoppel is essential to make a judgment in one action obligatory in another, although the point in issue is the same in each case. * * *

To prevent the rule from working injustice it is essential that its operation be mutual. *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362; *Schindler* v. *Royal Ins. Co., supra; People* v. *Rohrs*, 49 Hun. 150 (N. Y.). If the present case had been tried first, an adjudication in it against the respondent certainly would not have established his guilt in the criminal proceeding. "The consideration that protects him against the plea of *res judicata* in the one case deprives him of its benefits in the other." *State* v. *Roach, supra,* at p. 612.

The consequences of a criminal prosecution under Section 146 (b) are, of course, criminal. Such a prosecution is for "the highest form of crime against the revenue laws." *United States* v. *Miro*, 60 F. (2d) 58, 60 (C. C. A. 2d). In case of conviction the result is a fine, or imprisonment, or both. The object of seeking to collect the deficiency

herein, including the fifty per centum addition thereto, is to provide public revenue. The addition is imposed by the statute upon the determination of the fact of fraud found by the Commissioner. The determination of that fact and the collection of the tax are administrative in function. These vital differences further demonstrate the inapplicability of the doctrine of *res judicata* to the present case.

(3) *The issue in the present proceeding in respect to the fifty per centum addition to the deficiency is different from the issue litigated in the criminal proceeding.* The respondent must establish that the issue litigated in this proceeding was determined in his favor in the criminal action. *Tait* v. *Western Md. Ry. Co.*, 289 U. S. 620, 623. As in the civil law it is essential to show not only *eadem res* but also *eadem quaestio*. Bower, The Doctrine of Res Judicata 115.

In order to make the former judgment *res judicata,* the respondent pleads that the issues are "identical" (R. 13). In the tribunals below he sought to establish this by referring to certain extracts from the court's charge and certain parallels in the facts. He relied upon the fact that much of the evidence introduced before the Board of Tax Appeals was from a stipulation referring to testimony and exhibits introduced in the criminal trial. This, of course, is not disputed. However, it is worthy of note that certain important evidence

was introduced before the Board of Tax Appeals which was not presented to the court in the criminal trial. This included convincing evidence from two witnesses that the respondent stated in January 1930, that he had not sold the 18,300 shares of stock (R. 299, 301); that the respondent was not above false swearing in connection with personal property tax (R. 183; YYY, R. 430–432); and, as indicated by a reading of his testimony (R. 146 *et seq.*), numerous contradictory and evasive statements furnished by the respondent himself.

But the test is not whether the evidence was the same in the two proceedings but whether the issue was identical. Even if the facts presented in this proceeding were identical with those adduced at the criminal trial, that would not establish identity of issues. *Stone* v. *United States,* 167 U. S. 178. In *Lewis* v. *Frick,* 233 U. S. 291, the facts in the subsequent civil proceeding to deport an alien were apparently the same as those presented in the criminal trial. In *United States* v. *Donaldson-Shultz Co.,* 148 Fed. 581 (C. C. A. 4th); and *United States* v. *Warner Bros. Pictures,* 13 F. Supp. 614 (E. D. Mo.), the facts on which the injunctions were granted were the same as those presented in the criminal trials which had resulted in acquittals. The facts offered in evidence to establish the matters in issue are not themselves the issue. The issue is framed by the allegations in the complaint which the opposing party controverts by

his pleading. *Reynolds* v. *Stockton,* 140 U. S. 254, 270–271.

The criminal action was based upon Section 146 (b), which is directed against "any person who *willfully attempts* in any manner to *evade or defeat any tax imposed* by" the income tax title of the revenue Act, or the payment thereof. [Italics supplied.] In contrast to this, Section 293 (b), which imposes the addition to the deficiency contested by the respondent in this case, applies "if any part of any deficiency is due to *fraud* with intent to evade tax." [11] [Italics supplied.] Comparison of the two statutes demonstrates that the issue of fraud which is involved under Section 293 (b) is not an issue in a criminal prosecution under Section 146 (b). *United States* v. *Scharton,* 285 U. S. 518. See also *United States* v. *Troy,* 293 U. S. 58; *Castle* v. *United States,* 17 F. Supp. 515 (C. Cls.). In the *Scharton* case the taxpayer was indicted under Section 1114 (b) of the Revenue Act of 1926, which is substantially identical with Section 146 (b) of the Revenue Act of 1928. Scharton moved to quash the indictment because the offenses were committed more than three years prior to the return of the true bill. Section 1110 (a) of the 1926 Act provided a three-year statute of limitations, except for offenses involving the de-

[11] Observe that "wilfulness", which is an element of the crime denounced by Section 146 (b), is not included in Section 293 (b). Cf. *United States* v. *Murdock,* 290 U. S. 389.

frauding or attempting to defraud the United States, or any agency thereof, in any manner where the period of limitation was fixed at six years. The question was thus squarely presented as to whether the element of fraud was a part of the charge. The indictment was quashed on the ground "that the offense defined by use of the words 'evade or defeat' does not involve defrauding or attempting to defraud within the intent of the proviso" (p. 520). On appeal, the Government urged that "fraud is implicit in the concept of evading or defeating" and that "any effort to defeat or evade a tax is said to be tantamount to and to possess every element of an attempt to defraud the taxing body" (pp. 520–521). But this Court affirmed and held that the three-year statute of limitations applied because under Section 1114 (b) of the 1926 Act an averment of fraud in the indictment was surplusage, "for it would be sufficient to plead and prove a wilful attempt to evade or defeat" (p. 521). The *Scharton* case thus squarely holds that the element of fraud is not an issue in a prosecution under Section 146 (b) of the 1928 Act.[12] This holding when applied to this case, defeats the respondent's contention that the issue of fraud involved in this

[12] After Scharton's indictment was quashed he sought to escape the payment of the tax upon that ground. The Board of Tax Appeals decided against him in *Scharton* v. *Commissioner*, 32 B. T. A. 459, saying (at p. 464):

"Even if the quashing of the indictment in the criminal proceeding might be said to be a judgment of acquittal, it is not *res judicata* in this proceeding. It is not even admis-

suit for the fifty per centum addition to the deficiency is *res judicata,* for that issue was not present in the criminal case.

(4) *The doctrine of res judicata should not be applied to deprive the Government of an important civil safeguard provided by Congress for the protection of the revenue.* As urged throughout this brief, Sections 146 (b) and 293 (b) are in no way mutually dependent. They appear in different parts of the Revenue Act and under different headings. Section 146 (b) invokes the judicial processes of a criminal proceeding. Section 293 (b) comes into play only when the administrative machinery of determining and asserting a deficiency is in operation. One is clearly criminal; the other is clearly civil and intended by Congress as a civil safeguard.

Res judicata is a doctrine of the common law. It rests on no constitutional prohibition, but serves as a part of the adjective law for the purpose of repose. Such purpose has never been held to include a prohibition against maintaining a nonpunitive civil proceeding after a criminal prosecution. Here the intent of Congress in providing Section 293 (b) as a civil safeguard independent of the criminal Section 146 (b) is persuasive in determining that the doctrine of *res*

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sible as evidence of the truth or falsity of the facts decided in the prior proceeding. See *Coffey* v. *United States*, 116 U. S. 436; *Stone* v. *United States*, 167 U. S. 178; 34 Corpus Juris 971; 15 Ruling Case Law 1000–1003, and cases cited."

judicata is not applicable to the present proceeding. Cf. *Sourino* v. *United States,* 86 F. (2) 309, 311 (C. C. A. 5th), certiorari denied, 300 U. S. 661.

To apply the doctrine of *res judicata* in this case would mean that the Government must henceforth elect between the civil and the criminal proceeding, and when one course is chosen the other is thereby closed. In the court below the respondent insisted that the Government took that gamble and lost. Clearly it is not the law, and the Congress never intended that it should be the law, that the right of the Government to collect its revenue is to be determined by the technique of the gaming table. In *United States* v. *Donaldson-Shultz Co.,* 148 Fed. 581, 585 (C. C. A. 4th), the court said (at p. 585):

> It is argued by the appellee that because the United States proceeded first by indictment, and upon the trial there was verdict of acquittal, that conditions must remain in statu quo, and that the government has no further right to proceed in a civil action to remove an obstruction to a navigable stream which it is alleged still exists. If this be the law, then the right of the government to maintain the navigable waters in a condition suitable for navigation and free from obstruction would, in many cases, be absolutely destroyed by the vicissitudes, the uncertainties, and the local environments attending criminal trials. An obstruction might exist and yet the evidence adduced in a criminal

> trial might not be sufficient in the minds of the jury to convince them beyond what the law calls a reasonable doubt, which is necessary in such trials in order to authorize a verdict of guilty. * * *

Similarly, the Government's right to collect its revenue should not be subjected to the uncertainties of a criminal prosecution. In spite of the difficulties of obtaining a conviction for tax evasion, in certain cases it is of the utmost importance that the Government first proceed by criminal prosecution. Public policy demands that the Government should be free to proceed by criminal action without forfeiting its right to the collection of any additional taxes which may be found to be due.

CONCLUSION

That portion of the judgment of the court below relating to the fifty per centum addition to the tax imposed under Section 293 (b) of the Revenue Act of 1928 is clearly erroneous and should be reversed.

Respectfully submitted.

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APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 146. PENALTIES.

(a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a

partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

SUPPLEMENT M—INTEREST AND ADDITIONS TO THE TAX

SEC. 291. FAILURE TO FILE RETURN.

In case of any failure to make and file a return required by this title, within the time prescribed by law or prescribed by the Commissioner in pursuance of law, 25 per centum of the tax shall be added to the tax, except that when a return is filed after such time and it is shown that the failure to file it was due to reasonable cause and not due to willful neglect no such addition shall be made to the tax. The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, in which case the amount so added shall be collected in the same manner as the tax. The amount added to the tax under this section shall be in lieu of the 25 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after

the filing of such waiver or to the date the deficiency is assessed whichever is the earlier.

SEC. 293. ADDITIONS TO THE TAX IN CASE OF DEFICIENCY.

(a) *Negligence.*—If any part of any deficiency is due to negligence, or intentional disregard of rules and regulations but without intent to defraud, 5 per centum of the total amount of the deficiency (in addition to such deficiency) shall be assessed, collected, and paid in the same manner as if it were a deficiency, except that the provisions of section 272 (i), relating to the prorating of a deficiency, and of section 292, relating to interest on deficiencies, shall not be applicable.

(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected, and paid, in lieu of the 50 per centum addition to the tax provided in section 3176 of the Revised Statutes, as amended.

Revised Statutes:

SEC. 3176 [as re-enaccted by Section 1103 of the Revenue Act of 1926].

If any person, corporation, company, or association fails to make and file a return or list at the time prescribed by law or by regulation made under authority of law, or makes, willfully or otherwise, a false or fraudulent return or list, the collector or deputy collector shall make the return or list from his own knowledge and from such information as he can obtain through testimony or otherwise. In any such case the Commissioner of Internal Revenue may, from his own knowledge and from such information as he can obtain through testi-

mony or otherwise, make a return or amend any return made by a collector or deputy collector. Any return or list so made and subscribed by the Commissioner, or by a collector or deputy collector and approved by the Commissioner, shall be prima facie good and sufficient for all legal purposes.

If the failure to file a return (other than a return under Title II of the Revenue Act of 1924 or Title II of the Revenue Act of 1926) or a list is due to sickness or absence, the collector may allow such further time, not exceeding 30 days, for making and filing the return or list as he deems proper.

The Commissioner of Internal Revenue shall determine and assess all taxes, other than stamp taxes, as to which returns or lists are so made under the provisions of this section. In case of any failure to make and file a return or list within the time prescribed by law, or prescribed by the Commissioner of Internal Revenue or the collector in pursuance of law, the Commissioner shall add to the tax 25 per centum of its amount, except that when a return is filed after such time and it is shown that the failure to file it was due to a reasonable cause and not to willful neglect, no such addition shall be made to the tax. In case a false or fraudulent return or list is willfully made, the Commissioner shall add to the tax 50 per centum of its amount.

The amount so added to any tax shall be collected at the same time and in the same manner and as a part of the tax unless the tax has been paid before the discovery of the neglect, falsity, or fraud, in which case the amount so added shall be collected in the same manner as the tax. (U. S. C., Title 26, Secs. 1512, 1524.)

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

> ART. 791. *Penalties.*—The penalties provided for in section 146 can not be assessed but are enforceable only by suit or prosecution. * * *

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